83-103

No.

In the Supreme Court of the United States

October Term, 1983

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 246,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 7 of the National Labor Relations Act protects profane threats by two intoxicated strikers made at the home of a non-striking employee in front of his young daughter and pregnant wife as the National Labor Relations Board holds under its discredited theory that verbal threats lose the protection of the Act only if accompanied by physical acts or gestures.

2. Whether Section 7 of the National Labor Relations Act protects a striking employee's lewd, obscene and insulting remarks directed at and heard by the Company's Industrial Relations Manager in the presence of other employees.

3. Whether a Circuit Court of Appeals may order a company to sign a contract when the Court supplied a missing term to the alleged agreement that was never proposed or accepted by either party, especially when considered with evidence that there were other missing terms and irreconcilable conflicts in several Company proposals on the same matter, all of which the Union claimed to have accepted.

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RECORD CITATION

This petition involves issues arising out of the Eleventh Circuit Court of Appeals' enforcement of an order of the National Labor Relations Board. The transcript and exhibits of the initial administrative hearing were certified to the Eleventh Circuit Court of Appeals as Volumes I and II of the Official Record, and are cited in this petition as follows:

"T" refers to the Official Hearings Transcript (Vol. I of the Record on Appeal, No. 81-7852).

"GC" refers to the General Counsel's Exhibits received in evidence at the hearing (Vol. II of the Record on Appeal, No. 81-7852).

"RX" refers to the Company's exhibits received in evidence at the hearing (Vol. II of the Record on Appeal, No. 81-7852).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Woodkraft Division/Georgia Kraft Company,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 696 F.2d 921, and is reprinted in the Appendix at pages A1-A22.[2] The decision and order of the National Labor Rela-

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1. The parent companies of Woodkraft Division/Georgia Kraft Company are Time, Inc., Inland Container Corporation and Mead Corporation.

2. References to the opinions below are designated by "A", followed by the appropriate Appendix page number.

tions Board ("Board") and the decision of the Administrative Law Judge ("ALJ") are reported at 258 N.L.R.B. No. 121. The Board's decision is reprinted in the Appendix at pages A25-A47 and relevant portions of the ALJ's decision are reprinted in the Appendix at pages A48-A80.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1983. The petitioner's petition for rehearing and suggestion for rehearing en banc was denied on April 8, 1983. This Petition for Writ of Certiorari was filed within ninety (90) days of that date, in accordance with 28 U.S.C. § 2101(c) and Rules 20.2 and 20.4 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISIONS

As provided by Supreme Court Rule 21.1(f), the verbatim quotation of the following provisions of the National Labor Relations Act ("Act") (29 U.S.C. § 151 *et seq.*) are set forth in the separately bound Appendix hereto.

1. Section 7 of the Act (29 U.S.C. § 157);
2. Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5));
3. Section 8(c) of the Act (29 U.S.C. § 158(c));
4. Section 8(d) of the Act (29 U.S.C. § 158(d));
5. Section 10(e) of the Act (29 U.S.C. § 160(e)); and
6. Section 10(f) of the Act (29 U.S.C. § 160(f)).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

This Petition involves issues arising out of contract negotiations between Woodkraft Division/Georgia Kraft Company ("Georgia Kraft" or "Company") and Laborers' International Union of North America, AFL-CIO, Local 246 ("Union") during the fall of 1979.

The Union filed charges against the Company alleging the Company violated §§ 8(a)(1), 8(a)(3) and 8(a)(5) of the Act by refusing to execute a collective bargaining agreement and inter alia by discharging certain striking employees for misconduct during the strike.[3]

After a five day hearing the Administrative Law Judge ("ALJ") found that the parties never had a meeting of the minds and had not reached an agreement on a new collective bargaining contract. [A57-A58]. The ALJ also concluded that the Company did not violate the Act in discharging employees Landis Bishop, Jeffrey Hughes and Preston Barlow because their actions were of sufficient gravity to warrant such discipline. [A66, A67, A71-A74].

The NLRB reversed the ALJ's finding that an agreement was reached between the parties and concluded that the misconduct of employees Bishop, Hughes and Barlow was not sufficiently egregious to warrant discharge. [A26-A43].

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3. Twenty-eight employees were named as discriminatees in the original charge. Both the Board and the ALJ upheld the discharge of three of these employees. The Board found that the discharges of the remaining employees violated § 8(a)(1) of the Act, imposed traditional remedies for these violations and dismissed the § 8(a)(3) charges because of no discriminatory motive on the part of the Company. This petition involves those discharges that the ALJ upheld and the Board reversed.

A divided panel of the Eleventh Circuit issued its decision on January 24, 1983 granting enforcement of the Board's Order. [A22].[4] The dissenting judge, in line with the other Circuit Courts of Appeals and consistent with well-established precedent of the Eleventh Circuit, "refuses to join in sanctioning strike-related conduct that can generate fear in a person when he is standing in the door of his home." [A21].

The Eleventh Circuit denied the petitioner's request for rehearing and suggestion for rehearing en banc on April 8, 1983. [A23-A24].

B. Background of Company and Union

The Company's Greenville, Georgia plant is a sawmill that produces lumber, wood chips and related by-products. The Union was certified as the exclusive bargaining representative of all production and maintenance employees in September 1977 and the parties negotiated their first collective bargaining agreement effective January 1, 1978 until October 31, 1979.

C. The Contract Issue

The parties began negotiations on a new contract in September, 1979. The Company desired to make a major change in the old contract by establishing work areas, job classifications and specific lines of progression. This required elimination of the old point system under which employees were paid according to the points they earned through qualifying to do certain types of work and seniority. Having earned the points, they were paid on the basis of points and not according to the job they were performing.

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4. Jurisdiction in the Court of Appeals was based on 29 U.S.C. §§ 160(e) and (f).

The Union called a strike beginning on November 15, 1979 with many issues unresolved and when there were no proposals on critical terms of a new contract such as the date the point system ended, the effective date of a new contract and the expiration date of the contract. During the strike many strikers returned to work and negotiations continued. The strike ended on December 10, 1979 when most of the remaining strikers offered to return to work.

On December 3, the Company's negotiator, Mr. Kelly, and a representative for the Union, Mr. Henson, met at the offices of the Federal Mediation and Conciliation Service to negotiate. Mr. Kelly submitted a hand drawn diagram which in general proposed work areas, job classifications, and lines of progression. [GC 19]. At the same meeting, Mr. Kelly presented a list of striking employees that the Company wanted to discipline for misconduct [GC 29], but Mr. Henson refused to discuss it. [A7].

It is undisputed that there was no agreement on a contract by the end of the December 3 meeting.

On December 9, 1979 the Union sent a telegram to the Company stating:

> This is to advise you that the last Company offer presented on December 3, 1979, has been accepted as a final and binding contract . . . . [A8, GC 20].

On December 19 the parties met and the Company presented a "Memorandum of Agreement." [A8, GC 22]. The document dealt with unresolved issues that the parties had discussed for some time, including a proposal on disciplining certain strikers and new issues that had arisen because of the strike. It also proposed resolution of conflicts between earlier proposals and the Company's De-

cember 3 proposal dealing with job classifications and lines of progression. The parties were unable to agree on all the items proposed in the Memorandum of Agreement and the Union took the position that there was a contract as of its December 9 telegram.

Subsequently the parties exchanged letters indicating they had not changed their positions. [GC 23-25]. On March 12, 1980 the Union notified the Company that it had prepared an agreement. [GC 26]. The Union repeatedly refused or ignored the Company's requests for a copy of the alleged contract, failed to respond to a Company request to meet and confer and finally cancelled a scheduled meeting. [GC 27, 28; RX 3, 4, 5, 6, 7 and 8]. On July 11, two days before the Administrative Hearing in this case, the Union submitted to the Company a written version of what it believed to be the agreement. [A9, GC 33].

The Eleventh Circuit and the NLRB acknowledge that the Union's version of the December 9 agreement contains discrepancies from the proposals tabled by the Company [A18 and A38] and concluded that it was not the contract. Both held that the Company should have met with the Union and given assistance to reduce the contract to writing.

D. Striker Misconduct Issues

The Company discharged employees Landis Bishop and Jeffrey Hughes for striker misconduct. The ALJ credited non-striker Walker's testimony that Bishop and Hughes came to his home at night. They were drunk and were cursing him. They told him he was "screwing them out of their G.... damn money by working during the strike." Bishop said he would "take care of him [Walker]"

if he returned to work during the strike. [T 716-718]. This statement was repeated by Hughes. [T 718]. Hughes called him a "sorry mother f.....er." [T 719]. These comments were made on Walker's front porch and in the presence of his young daughter and pregnant wife. [A10; T 717, 718].

The ALJ upheld the discharges finding that "Bishop and Hughes . . . *threatened him with bodily injury if he returned to work.*" [A67; Emphasis added]. The Board overruled the ALJ. The Eleventh Circuit enforced the Board's order and held that the Board's standard for evaluating threats comports with Section 7 of the Act in protecting strike-related conduct. [A20].

The Company discharged Preston D. Barlow on December 20, 1980 for using lewd and abusive language toward Industrial Relations Manager Barbara Lawler while he was on the picket line. The ALJ credited Manager Lawler's testimony that she heard Barlow refer to her as a "bitch," that "f.....ing bitch," "that mother f.....er," and "that ugly bitch" on two occasions in the presence of other employees. [A67; T 799-800]. The ALJ concluded that "Barlow's statements about a supervisor, made within her hearing in the presence of other employees, were sufficiently insulting and abusive so as to justify his discharge." [A73]. The Board agreed that Barlow's actions were "lewd and insulting" but held they did not warrant discharge. [A42]. The Eleventh Circuit, after characterizing Barlow's comments as "crude and obscene" enforced the Board's order stating, without citation to any authority, that "name calling . . . without more, is privileged . . . under Section 8(c) of the Act." [A10].

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Adoption Of The Board Standard That Verbal Threats, Short Of A Direct Threat Of Immediate Physical Harm, Lose The Protection Of The Act Only When Accompanied By Physical Acts Or Gestures, Presents A Conflict Among The Circuit Courts Of Appeals; Departs From The Accepted Course Of Judicial Proceedings By Failing To Follow Controlling Precedent; And Raises A Significant Issue Concerning The Rights Of Non-Striking Employees To Be Free From Fear And Intimidation Which Should Be Addressed By This Court.

The new rule announced by a divided panel of the Eleventh Circuit has been expressly rejected by the First and Third Circuits, the only two Circuit Courts to have specifically spoken to the Board's standard. In *Associated Grocers of New England v. NLRB*, 562 F.2d 1333 (1st Cir. 1977) and *NLRB v. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977) the courts adopted an objective standard that threats which reasonably instill fear of bodily harm or reasonably intimidate are not protected by Section 7. In addition, a divided panel of the Tenth Circuit Court of Appeals recently avoided adopting or rejecting the Board standard by noting that the employer's refusal to reinstate in that case would not have met the objective standards of the First and Third Circuits either. The dissent argued that the Court should address the issue and clearly adopt the standard set forth by the First and Third Circuits. *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763 (10th Cir. 1982).

In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967) this Court established that an employer must reinstate

employees who have engaged in an economic strike "unless the employer who refuses to reinstate strikers can show that his action was due to legitimate and substantial business justification." 389 U.S. at 378. In *Fleetwood* this Court also held that it is the primary responsibility of the Board to strike the proper *balance* between the asserted business justifications and the invasion of employees' Section 7 right to organize and strike. 389 U.S. at 378. 29 U.S.C. § 157.

During the fifteen years since this Court last ruled on the reinstatement rights of strikers, the Courts of Appeals have established that strike misconduct constitutes a "legitimate and substantial business justification" for refusing to reinstate a striking employee. *See, e.g., Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763 (10th Cir. 1982); *Associated Grocers v. NLRB*, 562 F.2d 1333 (1st Cir. 1977); *NLRB v. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977). When the misconduct of the striking employees involves threats to non-striking employees, the Board has developed a rule that an employer is not entitled to discharge a striker for threats unless the threats are accompanied by physical acts or violence. *See, A. Duie Pyle, Inc.*, 263 N.L.R.B. No. 92 (1982). This standard is not supported by *Fleetwood* and has never before been accepted by any Circuit Court of Appeals because it absolutely protects threats without balancing the equally important rights of the non-striking employees to be free from fear and intimidation when exercising their Section 7 right to refrain from striking. 29 U.S.C. § 157.

In the case before this Court the ALJ denied reinstatement to Landis Bishop and Jeffrey Hughes after finding that the two intoxicated strikers made a nighttime visit to the home of a non-striking employee, swore at him and threatened him with bodily injury in the presence

of his young daughter and pregnant wife. [A67]. The Board overruled the ALJ finding the threats "to take care of" Walker to be "ambiguous" and not sufficient to warrant discharge since unaccompanied by physical acts or gestures. [A40]. The Eleventh Circuit enforced the Board's Order with a dissent that refused "to join in sanctioning strike-related conduct that can generate fear in a person when he is standing in the door of his home." [A21-A22].

The Eleventh Circuit's new rule that verbal threats lose the protection of Section 7 rights only when accompanied by physical acts or gestures was rejected by the First Circuit in *Associated Grocers of New England v. NLRB*, 562 F.2d 1333 (1st Cir. 1977). In rejecting the Board's theory the First Circuit stated that,

> The Board's formula . . . is too inelastic to provide a reliable means for distinguishing serious misconduct or threats from protected activity. A serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker. 562 F.2d at 1336.

The Third Circuit discussed its rejection of the Board's standard as follows:

> We recognize that some confrontations between strikers and non-strikers are inevitable and that not every impropriety is grounds for discharge. Moreover, we recognize that it is the primary responsibility of the Board and not the Courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights.' [Citations omitted]. Yet, we do not believe that the employer must countenance conduct that amounts to intimidation and threats of bodily harm. Threats are not

> protected conduct under the Act, and we fail to see how a threat acquires protected status simply because it is unaccompanied by physical acts or gestures. The question is whether a threat is sufficiently egregious, not whether there is added emphasis.

NLRB v. McQuaide, Inc., 552 F.2d 519, 527 (3d Cir. 1977). The First and Third Circuits adopted the following standard for determining when misconduct loses the protection of Section 7:

> Whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the rights protected under the Act.

Associated Grocers of New England v. NLRB, 562 F.2d 1333, 1336 (1st Cir. 1977); *NLRB v. McQuaide, Inc.*, 552 F.2d 519, 528 (3d Cir. 1977) quoting *Local* 542, *Operating Engineers v. NLRB*, 328 F.2d 850, 852-53 (3d Cir. 1963), *cert. denied*, 379 U.S. 826 (1964). This is an objective test. It is not relevant that no one was in fact coerced or intimidated. The test of coercion and intimidation is not whether the conduct proves effective. *NLRB v. McQuaide, Inc.*, 552 F.2d at 528 (3d Cir. 1977). In adopting this objective test, the Third Circuit rejected other subjective tests that focus on the intent of the striker or the effect on the non-striker. Petitioner urges that this Court reject the Board's discredited standard and adopt the objective standard of the First and Third Circuits.

Under this objective standard it is respectfully suggested this Court should find that the actions of Landis Bishop and Jeffrey Hughes reasonably tended to coerce William Walker in the exercise of his protected right to work during the strike. Certainly under the circumstances Mr. Walker was reasonably in fear of bodily harm and

was reasonably intimidated by Mr. Hughes and Mr. Bishop. Threatening a non-striker with bodily harm at his home at night in the presence of his wife and child are sufficiently egregious circumstances to justify this finding.

The Board's standard should be rejected because it does not follow the balancing rule announced in *Fleetwood* and because threats are not protected conduct under Section 7 of the Act. Furthermore, the Eleventh Circuit's adoption of the standard presents a clear conflict among the Circuit Courts of Appeals.

Petitioner respectfully requests that the conflict between the Circuits on this important issue of striker discipline justifies the grant of certiorari to review the judgment below, and to consider the validity of the Board's discredited standard for evaluating threats.

In addition, the Eleventh Circuit's decision departs from the accepted course of judicial conduct by failing to follow controlling precedent. Prior to the decision in this case the Fifth Circuit repeatedly refused to endorse the Board's efforts to characterize obviously threatening remarks as ambiguous.[5] In *NLRB v. Moore Business Forms*, the Fifth Circuit refused to enforce a Board order to reinstate a striking employee who retorted, "There's ways to keep you from it" when a non-striking employee informed him that he was going to work. This encounter took place in the daytime at the plant site and there was no allegation that the remark was accompanied by any physical act or gesture. In refusing to enforce this order, the Fifth Circuit specifically rejected the Board's characterization of this obviously threatening comment as

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5. The decisions of the United States Court of Appeals for the Fifth Circuit handed down by that Court prior to the close of business on September 30, 1981 are binding as precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (1981).

"ambiguous." The Eleventh Circuit distinguishes *Moore Business Forms* from this case on the meritless ground that the record in this case shows that violent acts were only committed against property and not against persons. This after-the-fact distinction is incorrect and is little comfort to the *person* being threatened at home by two intoxicated strikers. The ALJ specifically found there were widespread acts of violence including rock throwing and pointing a gun at the plant manager. The ALJ noted the Company had a genuine problem that culminated in a state court injunction. [A70].

In *Firestone Tire & Rubber Co.*, 449 F.2d 511 (5th Cir. 1971), a striking employee approached the car of a non-striking employee as he crossed the picket line and began to curse him and told him that if he "did anything he was going to get my . . . ass." The non-striking employee's wife and child were with him in the car. The trial examiner concluded that this was a threat of physical harm and constituted serious misconduct warranting termination. Typically, the Board disagreed with the trial examiner's conclusion and characterized the remark as "vague and ambiguous." In denying the enforcement the Fifth Circuit acknowledged the circumscribed review allowed by *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), but stated simply, "We are unable to find substantive evidence to justify the Board's interpretation—in opposition to its Trial Examiner—of Whitehead's remarks and related activities." 449 F.2d at 512.

The petitioner respectfully requests that this Court decide that striking employees lose the protection of the Act when they threaten non-striking employees with a threat that reasonably tends to create a fear of physical harm or reasonably coerces and intimidates non-striking employees.

II. The Eleventh Circuit's Decision That Crude And Obscene Remarks Directed At And Heard By A Female Management Executive Are Privileged Under The Free Speech Provisions Of Section 8(c) Of The Act States A Patently Erroneous Rule Of Law; Fails To Follow Controlling Precedent; And Fails To Balance The Employer's Right To Maintain Order And Respect.

The Eleventh Circuit's Decision, after characterizing Preston Barlow's comments as "crude and obscene" states *without citation* that "name-calling . . . without more, is privileged under the free speech provisions of Section 8(c) of the Act. 29 U.S.C. § 158(c)." [A21].

However, Section 8(c) does not create any rights for employees and does not provide any protection for strike misconduct. A striking employee's misconduct is protected, if at all, under Section 7 of the Act. Section 8(c) on its face guarantees that an expression of opinion which is free from threats of reprisal or force or promise of benefits "shall not constitute evidence of an unfair labor practice" against the party expressing the opinion. 29 U.S.C. § 158(c). Since only companies and unions can commit unfair labor practices, Section 8(c) applies only to them. Such an erroneous and unsubstantiated construction of the Statute clearly warrants review by this Court.

In addition, Barlow's conduct is not protected by Section 7 of the Act. 29 U.S.C. § 157. The ALJ found that on one occasion Preston D. Barlow screamed at Barbara Lawler, the plant's Labor Relations Manager while she was leaving the plant, "that f..... bitch," and "that mother f....., that ugly bitch." This happened in the presence of other employees. On another occasion, he yelled at Mrs. Lawler, "that ugly bitch." [A67]. The ALJ concluded that "Barlow's statements about a supervisor, made within her hear-

ing in the presence of other employees, were sufficiently insulting and abusive so as to justify his discharge." [A73]. The Board agreed that Barlow's actions were "lewd and insulting" but the Board held such actions did not warrant discipline. [A42].

By enforcing the Board's Order, the Eleventh Circuit announces a new law that allows and encourages a striking employee to hurl vile comments at a management employee in front of other employees with complete impunity even when there is no provocation.

Prior to the Eleventh Circuit's decision, the Fifth Circuit's rule had long been that "an employee may not act with impunity even though he is engaged in protected activity." *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 729 (5th Cir. 1970). In *Boaz Spinning Co. v. NLRB*, 395 F.2d 512 (5th Cir. 1968) the Court refused to enforce a Board order to reinstate an employee who was discharged for calling the plant manager a "Castro" during the protected activity of a grievance meeting. The Court stated that,

> Undoubtedly flagrant conduct of an employee *even though occurring in the course of Section 7 activity*, may justify disciplinary action by the employer. On the other hand, not every impropriety committed during such activity places the employee beyond the protective shield of the Act. The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. 395 F.2d at 514. [Emphasis added].

Although the responsibility to draw the line between the conflicting rights rests with the Board, *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 730 (5th Cir.

1970), the Board's rule falls short of any balance in that it grants full immunity to strikers to direct abusive language without any regard for the right of non-strikers. This rule is not compatible with the precedent of the Eleventh Circuit or with Section 7 of the Act.

Aside from the business justification of not affording protection to strikers who use abusive language toward superiors as discussed above, this Court should be concerned about the Board's and Eleventh Circuit's absolute holding that any and all abusive language used by a striker is protected by Section 7 of the Act. In *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957), this Court held:

> . . . [P]etitioners urge that all this abusive language was protected and that they could not, therefore, be enjoined from using it. We cannot agree. Words can readily be so coupled with conduct as to provoke violence . . . . 355 U.S. at 138.

This Court held there that the State of Arkansas had the right to enjoin abusive language that was calculated to provoke violence or was likely to do so. Very rarely could language such as used by Mr. Barlow be used by strikers against non-strikers without provoking violence. Certainly in all instances where such abusive language is used, the likelihood of violence ensuing is substantial.

How can the Board's broad, open-ended standard of affording protection to all abusive language used by strikers be balanced with this Court's decision in *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957)? It is quite an anomaly to have the Board and the Eleventh Circuit saying that strikers are protected by federal law in using any sort of abusive language and the Supreme Court saying a state may enjoin a striker for using abusive language that may provoke violence.

Only this Court can resolve this dilemma by establishing the proper standard which strikes the balance for all legitimate interests. Petitioner respectfully suggests that this is sufficiently important as to warrant review by this Court.

III. The Eleventh Circuit's Decision Which Supplies A Missing Term To The Alleged "Agreement" Between The Parties Is In Direct Conflict With This Court's Decisions In H. K. Porter v. NLRB, 397 U.S. 99 (1977) And NLRB v. American Insurance Co., 343 U.S. 395 (1952).

In *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), the Supreme Court made clear that the NLRB cannot require the parties to agree to a specific term. The Court stated,

> While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone *without any official compulsion over the actual terms of the contract.* 397 U.S. at 108. [Emphasis added].

In *NLRB v. American Insurance Co.*, 343 U.S. 395, (1952) this Court in discussing employers' and employees' duty to bargain in good faith, stated that it is "clear that the Board may not either *directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.*" 343 U.S. at 404. [Emphasis added].

The Eleventh Circuit opinion directly conflicts with the decisions of the Supreme Court by adding a term to the alleged agreement that was never proposed by the

Company, the Union, or even the Board. *H. K. Porter v. NLRB*, 397 U.S. 99 (1970); *NLRB v. American Insurance Co.*, 343 U.S. 395 (1952). 29 U.S.C. § 158(d).

Throughout this proceeding the Company has consistently argued that, in addition to other key terms of the contract, the parties had never agreed on an effective date. It is undisputed that at the time of the Union's December 9 telegram neither the Company nor the Union had ever proposed an effective date for the contract. There were no proposals by either party—and hence no agreement—prior to the strike. There were no proposals by either party—hence no agreement—prior to the Union's telegram. The Company first proposed an effective date in a December 19 Memorandum of Agreement [GC 22], ten days after the date the Board found a contract was created. In this Memorandum the Company proposed November 1, 1979. Based on this subsequent proposal, the Board speculated that the parties had not contemplated a hiatus between the old and new contracts. [A35]. The Company notes that particularly when a strike has occurred, the effective date of a contract is frequently a significant item of dispute between the parties and is subject to many proposals and counter proposals.

Incredibly, the Eleventh Circuit not only granted enforcement of the Board order to execute a contract without an effective date but actually supplied an effective date of November 15, 1979 in Footnote 8 of its Opinion. [A17, A18]. Neither the Company nor the Union ever proposed or agreed to that date. Supplying missing terms to a contract is in direct conflict with the well-established law that the Board cannot force an employer or a union to sign a contract to which it has not agreed, 29 U.S.C. § 158(d), *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *NLRB v.*

American Insurance Co., 343 U.S. 395, 404 (1952). The Eleventh Circuit clearly does not have the authority to supply a missing term to a labor agreement and its actions in doing so warrant review by this Court.

Furthermore, the Eleventh Circuit panel's decision directly conflicts with *NLRB v. Downs-Clark, Inc.*, 479 F.2d 546 (5th Cir. 1973) where the Fifth Circuit refused to enforce a Board order to execute a contract where the parties had not agreed to wages and neither party had proposed an effective date or duration for the contract. The Court stated,

> The parties had not reached their express intention to arrive at a complete, integral agreement. While a labor contract is *sui generis*, like commercial or other contracts it comes into being with binding effect *only after there has been a meeting of the minds by the contracting parties* on a complete agreement. 479 F.2d at 548 [Emphasis added].

In the case before this Court the written proposals did not contain an effective date, duration, a date when wages would go into effect for each subsequent year of the contract and wage rates applicable to employees who would be temporarily assigned to higher paying jobs. Also, there was no agreement on some of the elements of the wage package.

In addition to missing terms, there were unresolved conflicting terms especially in Articles 5 and 11 of the alleged agreement. The Union's negotiator produced an alleged thirty-two page "contract" at the hearing and testified item by item that the Union had agreed to each and every one. [T 61-91]. However, that document clearly conflicts with the Company's proposals on permanent promotion and transfer procedures [A38 n.9; GC 33 p.4; RX

18], lateral bidding within area job classifications [GC 19, item 5, Promotions: GC 33 p.4], temporary shift assignments [A38 n.9; RX 19; GC 33 p.5], reductions in workforce [RX 17; GC 19, 33 p.5; T 403-404], and temporary vacancies [RX 20, 21, 22; GC 33 p.11]. The Eleventh Circuit and the Board both acknowledge these discrepancies but try to obscure them by claiming they result from the Company's refusal to assist in reducing the contract to writing. [A18; A39]. The problem with this argument is that there have never been any proposals made on how to resolve these discrepancies because of the Union's adamant position that there had been agreement upon all terms. The Eleventh Circuit rather disingenuously claims that the Board did not require the Company to execute the Union's document "but rather a contract embodying the agreement reached between the parties on December 9." [A18]. However, if the contract had been made on December 9, as the Board and the Eleventh Circuit found, it would have been impossible for the parties to meet and make proposals to resolve the conflicts. The Order is unenforceable because the parties have never reached an agreement on the Articles containing the significant discrepancies which the Board and Eleventh Circuit insist on ignoring.

In addition, the Eleventh Circuit applied irrelevant precedent to the facts of the case; *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87 (8th Cir. 1981). *Pepsi-Cola* stands for the proposition that offers made during collective bargaining negotiations are not terminated by a rejection or counter proposal and remain viable unless specifically withdrawn. The Company points out that this is not a case where the employer sought to withdraw a full contract proposal. The Company has never contended that its proposals were not viable and agrees that all Company proposals were still on the table when the Union sent its tele-

gram on December 9. The reason there was not a contract was because there were absolutely no proposals on several indispensable terms of the contract and there were direct conflicts in some of the proposals with other proposals on the same terms and with the terms selected by the Union in its version of the alleged agreement. In similar circumstances the Sixth Circuit recently declined to enforce a Board order to execute a written contract stating simply,

> Discrepancies between notations made by Orrin [Employer's negotiator] and the agreement in its final form are too apparent to satisfy us that certain substantive terms in the contract are reflective of agreements made during the bargaining session.

NLRB v. International Credit Service, 651 F.2d 1172, 1174 (6th Cir. 1982).

Both the Board and the Eleventh Circuit refused to consider the significant discrepancies in the Union's version of the contract and the Company's proposals as evidence that there was no agreement. In view of Barnes' explicit testimony that he had agreed to each article in it, these discrepancies cannot be ignored. The Union's December 9 telegram purported to accept the Company's last proposal on December 3. However, their "agreement" selects language from some earlier proposals and omits some language from the December 3 proposal.

It is respectfully submitted that in light of these omissions and discrepancies, the Eleventh Circuit's conclusion that the Board's findings were supported by substantial evidence is incorrect and should be carefully reviewed. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

Petitioner respectfully submits that the Eleventh Circuit has failed to follow the clear and well-established precedent of this Court and for this reason further review is warranted.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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